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No. _____

In The

Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS,

Petitioner,

v.

JAMEL RIVERA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When Congress, in 48 U.S.C. §1493, granted Territorial prosecutors the power to appeal an "adverse decision, judgment or order" of intermediate appellate courts, did it intend to limit this authority to only final decisions?

2. If 48 U.S.C. §1493(c) authorizes Territorial prosecutors to appeal only final decisions of intermediate appellate courts, is the finality of those decisions determined in the same way this Court determines the finality of state court judgments for purposes of its jurisdiction under *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)?

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PETITION FOR WRIT OF CERTIORARI

The Government of the Virgin Islands ("Government") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 333 F.3d 143 (3d Cir. 2003), and is reprinted starting at Appendix 1. The order denying the petition for rehearing by the panel and the Court *en banc* was entered on August 18, 2003, and is reprinted at Appendix 18.

The opinion of the Appellate Division of the District Court of the Virgin Islands is reported at 183 F. Supp. 2d 770 (D.V.I. 2002). However, the Third Circuit dismissed this case on jurisdictional grounds and did not address the substance or merits of the Appellate Division opinion. Therefore, it has not been included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 18, 2003. (App. 1) The petition for rehearing by the panel and by the Court *en banc* was denied on August 18, 2003. (App. 18) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

This case involves the interpretation of 48 U.S.C. §1493, which in pertinent part reads:

> The prosecution in a territory or Commonwealth is authorized – unless precluded by local law – to seek review or other suitable relief in the appropriate local or Federal appellate court, or, where applicable, in the Supreme Court of the United States from – (c) an adverse decision, judgment, or order of an appellate court.

The statute is reproduced in full in the Appendix at 20, along with 48 U.S.C. §1613a and 18 U.S.C. §3731. App. 20-21.

STATEMENT OF THE CASE

Congress has exercised its plenary power over the Territory of the Virgin Islands by mandating a criminal justice system in which appeals from territorial court decisions are taken to a three-judge panel of the United States District Court for the Virgin Islands and then to the Third Circuit Court of Appeals. This ensures that decisions by the United States District Court, when acting in its capacity as the territorial appellate court, will not be the final word, and that defendants and prosecutors in cases tried in territorial courts will ultimately obtain review of disputed legal issues by an Article III court of appeals. This system was created by Congress to allow the courts of the Territory to develop into American courts following the traditions of the common law, but always with federal oversight.

The decision by the Third Circuit in this case has disrupted this carefully designed scheme and effectively eliminated federal court of appeals review of all cases in which the District Court vacates a sentence imposed by a local Virgin Islands court and remands for resentencing. Moreover, the Third Circuit's decision conflicts with decisions by the Ninth Circuit – the only other court of appeals whose jurisdiction encompasses United States territories – on this precise issue. This Court's intervention is needed to ensure that the territories are treated in accordance with Congress's intent and equally with each other.

A. Statutory Background

1. The Virgin Islands were purchased from Denmark in 1917. *See* Convention Between the United States and Denmark for Cession of the Danish West Indies (Jan. 25, 1917), *reprinted in* 39 Stat. 1706. Within six weeks, Congress vested jurisdiction over appeals from the local courts in the Third Circuit. Act of March 3, 1917, ch. 171, §2, 39 Stat. 1132.

Although the local territorial courts were not initially granted jurisdiction over criminal cases, through a series of enactments Congress and the Legislature of the Virgin Islands (acting pursuant to federally-conferred authority) granted the local courts jurisdiction over most misdemeanors and felonies. *See* Act of June 22, 1936, ch. 699, §32, 49 Stat. 1814; Act of July 22, 1954, ch. 558, 68 Stat. 506; 3 V.I.C. §76.

Concomitant with this expansion of the jurisdiction of the local courts was the expansion of the power of local prosecutors to enforce criminal laws in the Virgin Islands.

In 1954, Congress authorized the Territory to create a Department of Law, headed by an Attorney General. The Legislature of the Virgin Islands created the office in 1968, giving the Attorney General the power to prosecute all offenses against the laws of the Virgin Islands in the inferior courts and, with the consent of the United States Attorney, in the United States District Court of the Virgin Islands. 3 V.I.C. §§111-114; *see* historical note following 3 V.I.C. §111.

The Legislature of the Virgin Islands gradually transferred jurisdiction over the prosecution of serious criminal violations of territorial law from the District Court and the U.S. Attorney's Office to the Territorial Court and the Virgin Islands Attorney General's office. Since January 1, 1994, the Virgin Islands Attorney General has prosecuted in the Territorial Court all criminal cases charging violations of only territorial statutes, and has also handled the appeal of all such cases.

2. Congress has established a two-tiered appellate system for reviewing decisions issued by local territorial courts. First, Congress created a mid-level territorial appellate court in the District Court. 48 U.S.C. §1613a. (App. 21). The Chief Judge of the District Court is the presiding judge of the Appellate Division; three-judge panels of the court hear appeals. *Id.* §1613a(b) (App. 22). Second, Congress has authorized the Third Circuit to hear appeals from decisions of the Appellate Division. *Id.* §1613a(c) (App. 23); 28 U.S.C. §1291.

In 1982, the Third and the Ninth Circuits split over whether 18 U.S.C. §3731, which provides that the United States could appeal from an order granting a new trial after verdict in a criminal case, applied to territorial

prosecutors. *Government of the Virgin Islands v. Christensen*, 673 F.2d 713 (3d Cir. 1982) (statute applies); *People of the Territory of Guam v. Okada*, 694 F.2d 565 (9th Cir. 1982), *amended by* 715 F.2d 1347 (1983), *cert. denied*, 469 U.S. 1021 (1984) (statute does not apply).

Congress responded in 1984 by enacting 48 U.S.C. §1493. Sections (a) and (b) of the statute are very similar to 18 U.S.C. §3731, authorizing territorial prosecutors to appeal to the Appellate Division "a decision, judgment, or order of a trial court dismissing an indictment or information," and "a decision or order of a trial court suppressing or excluding evidence." *Id.* §1493(a), (b). Of particular relevance here, section (c) of the statute also authorizes territorial prosecutors to appeal to a federal court of appeals "an adverse decision, judgment or order of an appellate court." *Id.* §1493(c).[1]

The Third Circuit has held that §1493 did not impliedly repeal §3731, which (as noted) it had held applies to territorial prosecutors. *See Government of the Virgin Islands v. Mills,* 935 F.2d 591, 594-597 (3d Cir. 1991). In fact, the *Mills* panel inferred that by enacting §1493, "Congress wanted to expand the appellate authority of territorial prosecutors," and concluded that both 18 U.S.C. §3731 and 48 U.S.C. §1493 apply to territorial prosecutors.

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[1] Congress also authorized the territorial legislature to establish its own independent appellate court, and provided for 15 years of continued oversight by the Third Circuit after its establishment by means of review by writ of certiorari. 48 U.S.C. §§1611, 1613. The Virgin Islands Legislature has not yet established a territorial appellate court, and the Government is not aware of any plan to do so.

Mills, 935 F.2d at 597. In 1994, the Third Circuit determined that 18 U.S.C. §3731 authorizes an appeal by the Government from a decision of the Appellate Division of the District Court, as well as the Trial Division. *Government of the Virgin Islands v. Charleswell*, 24 F.3d 571 (3d Cir. 1994).

B. Factual and Procedural Background

On May 22, 1997, Respondent Jamel Rivera was convicted of first-degree assault in the Territorial Court of the Virgin Islands. The court sentenced Rivera to eight years imprisonment plus two years probation. Rivera appealed to the court that currently hears Territorial appeals: the Appellate Division of the federal District Court of the Virgin Islands. The Appellate Division affirmed the conviction, but held that the sentence was illegal because the trial court had no power under the applicable Territorial statutes to impose probation along with a sentence of incarceration longer than six months. The Appellate Division vacated the sentence and remanded. *Rivera v. Government of the Virgin Islands,* 42 V.I.R. 203 (D.C.V.I.App.Div. 2000).

On remand, the Territorial Court judge explained on the record that she had intended that Rivera be under Government supervision for a total of ten years for this vicious assault, and resentenced him to ten years incarceration. Rivera appealed, arguing that the court unlawfully increased his sentence. The Government argued that vindictiveness could not be presumed since the sentence conformed to the original intent of the sentencing judge, and the defendant showed no evidence of actual vindictiveness. However, the Appellate Division held that the

sentence was unlawful under *North Carolina v. Pearce*, 395 U.S. 711 (1969), vacated, and remanded for resentencing. *Rivera v. Government of the Virgin Islands*, 183 F. Supp. 2d 770 (D.C.V.I.App.Div. 2002).

The Government of the Virgin Islands appealed to the Third Circuit Court of Appeals pursuant to 48 U.S.C. §1493(c), on the ground that the Appellate Division ruling was "an adverse decision, judgment, or order of an appellate court." At oral argument, the court of appeals raised *sua sponte* the question whether it had jurisdiction to hear the appeal. Following supplemental briefing on the issue, the court held that it did not have jurisdiction. App. 1.

The court found that, even though §1493(c) "is silent on finality" and "appears to grant broad authority to the Government of the Virgin Islands to pursue an appeal," App. 7, finality is nonetheless required for the Government to appeal to the Third Circuit (unless an interlocutory appeal is authorized under 18 U.S.C. §3731 or the collateral order doctrine). The court pointed to 28 U.S.C. §1291 and 48 U.S.C. §1613a(c), which limit its jurisdiction to "final decisions" from the District Court, and observed that finality is an ancient rule that serves salutary purposes. App. 9.

The court recognized that the government can appeal interlocutory orders under §3731, notwithstanding the finality language in 28 U.S.C. §1291 and 48 U.S.C. §1613a(c). The court distinguished §3731 from §1493(c), however, on the ground that §3731 expressly refers to non-final orders, while §1493(c) does not. App. 9-11. The court also reasoned that its approach maintains consistency by treating appeals from the Appellate Division "the same as appeals from any other federal district court." App. 11-12.

The court of appeals next determined that the Government's appeal was not final and did not satisfy the collateral order doctrine. In reaching that conclusion, the court cited two prior decisions in which it had held that its jurisdiction over Appellate Division appeals is not analogous to this Court's jurisdiction over state court judgments. *Ortiz v. Dodge*, 126 F.3d 545 (3d Cir. 1997); *In re Alison*, 837 F.3d 619 (3d Cir. 1988). App. 14-15, fn. 15. The court therefore did not address whether this case would fit within any of the four categories described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which found that certain types of state-court judgments are ripe for review and considered to be final for jurisdictional purposes, even though further proceedings were to take place in the state court. *Flynt v. Ohio*, 451 U.S. 619, 620-21 (1981) (*per curiam*).[2]

The Government's petition for rehearing by the panel and the Court *en banc* was denied.

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[2] The Government's supplemental brief to the Third Circuit discussed the *Cox* categories, acknowledged that the court had twice previously refused to apply *Cox* to appeals from the Appellate Division, and argued that the principles underlying the *Cox* exceptions justified a holding that there is no finality requirement for appeals brought under §1493(c). In its Petition for Rehearing *En Banc* (at 16-17), the Government asked the *en banc* court to overturn the prior panel decisions and hold that the *Cox* definitions of finality apply to appeals taken from adverse decisions pursuant to 48 U.S.C. §1493(c).

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision creates a conflict among the circuits and deprives the Territory of the Virgin Islands of the ability to obtain review by a federal court of appeals of certain adverse decisions of the lower appellate court, including sentencing decisions. Because only this Court can resolve the conflict, correct the Third Circuit's error, and ensure that Virgin Islands' prosecutors have the full powers intended by Congress, certiorari should be granted.

I. THE TWO CIRCUITS AFFECTED BY 48 U.S.C. §1493(C) ARE IN CONFLICT.

Title 48 U.S.C. §1493 applies only to territories and Commonwealths, which in practice means the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. Therefore, the statute is subject to interpretation only by the Third and Ninth Circuits. These two circuits are in conflict over how to interpret and apply the statute: under Ninth Circuit precedent, had this identical appeal been brought by a Guam or Northern Mariana Islands prosecutor, the court of appeals would have had jurisdiction to hear it.

In *People of the Territory of Guam v. Borja*, 983 F.2d 914 (9th Cir. 1992), the Ninth Circuit assumed without discussion that finality is a requirement for an appeal pursuant to 48 U.S.C. §1493(c). However, the Ninth Circuit went on to find that an order of the Appellate Division of the District Court of Guam remanding for new trial in a criminal case is, in fact, a "final decision." This is because the Ninth Circuit assesses the finality of appellate decisions in territorial appeals in roughly the same way

that this Court determines the finality of state court judgments for purposes of 28 U.S.C. §1257(a), applying *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *Borja*, 983 F.2d *at* 916-917, *citing Guam v. Kingsbury*, 649 F.2d 740, 742 (9th. Cir.), *cert. den.*, 454 U.S. 895 (1981).

Applying the *Cox* reasoning, the Ninth Circuit held that "Appellate Division decisions requiring further proceedings in the trial court are considered final and appealable if the party seeking review would not have a right to appeal an adverse outcome of those subsequent state court proceedings." *Id.* Because the Government of Guam would not have had the right to appeal the defendants' acquittals on retrial, the Ninth Circuit held that the Appellate Division's decision to remand was final and appealable. *Id.*

In the instant case, the Government of the Virgin Islands will not have the right to appeal after the Respondent is resentenced. Accordingly, this case would have been appealable in the Ninth Circuit pursuant to 48 U.S.C. §1493(c). A direct conflict plainly exists, one that only this Court can resolve.[3]

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[3] Guam and the Commonwealth of the Northern Mariana Islands have now established local appellate courts. This has changed their relationship to the Ninth Circuit, which continues judicial oversight for 15 years after the date of the establishment of a local appellate court. *See* 48 U.S.C. §1424-2; *see also* Section 403(a) of the Covenant To Establish A Commonwealth Of The Northern Mariana Islands With The United States Of America (1986), *reprinted in* Historical and Statutory Notes *following* 48 U.S.C. 1801. Pursuant to the federal statute and the Covenant, the Ninth Circuit has jurisdiction over the appellate courts of the Northern Mariana Islands until 2004, and of Guam until the year 2011. Title 48 U.S.C. 1493(c) will still apply until

(Continued on following page)

II. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF 48 U.S.C. §1493(C) AND RENDERS THE PROVISION USELESS.

1. When, as here, the language of a statute is plain and the disposition required by the text is not absurd, then no "interpretation" is necessary; the plain language must be regarded as conclusive. *Hartford Underwriter's Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Title 48 U.S.C. §1493(c) expressly authorizes territorial prosecutors to appeal "an adverse decision, judgment, or order of an appellate court." The plain meaning of this language is that territorial prosecutors may appeal from *all* unfavorable decisions; the statute does not require that the decision be final, be of exceptional importance, involve the Constitution, laws or treaties of the United States, impact the public fisc, or anything else. The only requirement is adversity.

"Final decision" is a term of art that has been employed by Congress to limit the scope of some federal appeals since the adoption of the Judiciary Act of 1789. Congress chose not to use the phrase in 48 U.S.C. §1493(c), but created a new phrase never used before. By using the neologism "adverse decision, judgment or order" instead of the historic phrase "final decision," Congress must have intended to discard the traditional finality requirement in the tiny subset of appeals taken by territorial prosecutors from adverse decisions in criminal cases. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537

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then. Thus, although the conflict between the Third and the Ninth Circuits will be resolved by time, it remains very real.

(1994). ("'[I]t is generally presumed that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another,' and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism.") (internal citation omitted).

The second prong of *Hartford Underwriter's Insurance Co.*, 530 U.S. *at* 6, is also satisfied: the broad grant of authority is not absurd. Territorial prosecutors, unlike other federal prosecutors, work within a two-tiered appellate system. Congress understood that the ability to appeal adverse decisions of the intermediate appellate court is necessary to territorial prosecutors in order to avoid wasting prosecutors' time, scarce judicial resources, and taxpayers' money on unnecessary remands and retrials. *c.f. Cox,* 420 U.S. *at* 479 ("To dismiss the appeal would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.") (internal quotations omitted). Even more important than avoiding waste is avoiding the situation where territorial prosecutors lose the right to appeal at all after a remand or retrial, thus leaving bad law on the books as binding precedent that can never be appealed and corrected.

It must also be noted that, contrary to the assumption of the Third Circuit, it is not necessary to "harmonize" 28 U.S.C. §1291 and 48 U.S.C. §1613a with 18 U.S.C. §3731 and 48 U.S.C. §1493: the former two statutes allow all

litigants *except* prosecutors to appeal,[4] while the latter two allow *only* prosecutors to appeal. There is no contradiction to harmonize: each set of statutes addresses a situation not covered by the other set.

The Third Circuit's determination that the Government cannot appeal non-final decisions of the Appellate Division renders 48 U.S.C. §1493(c) virtually useless. If the Third Circuit is correct in ruling that §3731 applies to territorial prosecutors' appeals from the Appellate Division, then §3731 covers the vast majority of decisions from which the government would appeal, *i.e.*, remands for new trial. Virtually all other types of appellate decisions (such as the remand for resentencing in this case) that would not fall under §3731 would also not be final under the traditional definition of finality. Thus, under the Third Circuit's reasoning, there would be almost no case to which §1493(c) would apply. Conversely, if the Ninth Circuit's reasoning is correct and §1493 rather than §3731 was intended by Congress to describe the appellate powers of territorial prosecutors, then the Third Circuit's insertion of a finality requirement into §1493(c) also renders the statute useless. As noted above, the vast majority of

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[4] The common-law rule was that a prosecutor had "no right to appeal an adverse criminal judgment unless expressly authorized by statute to do so." *Arizona v. Manypenny*, 451 U.S. 232, 245 (1981). Since 28 U.S.C. §1291 and its predecessors (as well as its virtual twin, 48 U.S.C. §1613a) do not expressly authorize such appeals, the statute does not allow government appeals in criminal cases. *United States v. Sanges*, 144 U.S. 310, 318 (1892); *see generally United States v. Wilson*, 420 U.S. 332, 336-339 (1975) (history of common law rule and eventual grant of power to appeal pursuant to 18 U.S.C. §3731).

intermediate appellate decisions adverse to the Government are in the nature of remands for new trial, orders that are not final under the traditional definition of finality. Thus, the Third Circuit's insertion of a finality requirement into §1493(c) guts the statute and renders it essentially useless, a result that could not have been intended by Congress.

The decision of Congress not to add finality as a requirement is not unprecedented and not unwarranted, and should not have been treated as an error or oversight.

2. If the finality requirement of 28 U.S.C. §1291 must be read into 48 U.S. §1493(c), then the Third Circuit erred in not conforming to the test of finality applied by this Court to state court judgments appealed pursuant to 28 U.S.C. §1257, as the Ninth Circuit has done. Under this standard, finality may bar review of a state appellate decision where further state proceedings are pending. However, this Court has held that such decisions *are* final for §1257 purposes where the claim on appeal is "ripe for review." *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 482 (1975). In *Cox*, this Court described four situations in which state court appeals are ripe for review because "immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice." *Cox,* 420 U.S. *at* 478.

Appeals by territorial prosecutors in criminal cases could fall under both the first and third categories of cases discussed in *Cox*. The first category includes cases where there are further proceedings yet to occur in the state courts, but the issue presented would be conclusive and would obviate the need for further proceedings. The third category includes cases where the reviewable issue has

been finally decided, further proceedings in the state courts have been ordered, but a later review of the issue cannot be had. In these cases, if the party seeking review ultimately prevails, the federal issue will be mooted, possibly leaving erroneous but binding law as precedent; on the other hand, if that party were to lose on the merits, state laws would not permit it to appeal the federal issue. As the Supreme Court noted in *Cox*, state criminal cases involving questions of constitutional law (like this case) "epitomize" this category. 420 U.S. *at* 481.

III. THE THIRD CIRCUIT'S DECISION DEPRIVES THE TERRITORY OF A CRUCIAL POWER GRANTED TO IT BY CONGRESS AS PART OF A LARGER PLAN.

Since purchasing the Territory from Denmark in 1917, Congress has been preparing the Virgin Islands for eventual judicial autonomy by granting the Territory ever-increasing responsibility for the development of its laws and legal institutions. From the beginning, however, Congress has provided guidance for this development through oversight of the process by the United States Court of Appeals for the Third Circuit. The Third Circuit's reading of a strict finality requirement into §1493(c) interferes with this design and deprives the Territory of the full benefits of the congressional scheme.

The Attorney General of the Virgin Islands has the responsibility of prosecuting crimes in the Territorial Court and handling the appeals of such cases. The Appellate Division of the District Court (which is, and for the foreseeable future will remain, the intermediate territorial appellate court) has the responsibility of developing the law of the territory by deciding the cases presented to it.

When criminal defendants believe that the Appellate Division's interpretation of the law is incorrect, they can avail themselves of oversight by an Article III court of appeals by appealing to the Third Circuit. 48 U.S.C. §1613a(c). When the Government believes that the Appellate Division's interpretation of the law is incorrect in a criminal case, it, too, can obtain oversight by an Article III court pursuant to §1493(c). This ensures that incorrect District Court appellate decisions do not become law that is binding on the trial courts of the Territory simply because the decisions are unreviewable.

Congress's intent to give the Government of the Virgin Islands the power to appeal all mid-level appellate criminal cases is subtly underscored by 48 U.S.C. §1613, which, like 48 U.S.C. §1493, was enacted by Public Law 98-454 in 1984 to amend the Revised Organic Act of the Virgin Islands. *Compare* Act of October 5, 1984, Title VII, §704, 98 Stat. 1739 *and* Title X, §1003, 98 Stat. 1746. Title 48 U.S.C. §1613 authorizes the Territory to establish its own appellate court, but provides that even after a Territorial Supreme Court is created, the Third Circuit will have the power to review that court's decisions and correct its errors for at least 15 years, by means of a writ of certiorari. Congress has further provided that before the expiration of that 15-year period, the Third Circuit Judicial Council shall submit reports to Congress every five years concerning whether the territorial appellate court has "developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions." 48 U.S.C. §1613. Presumably, if the Third Circuit Judicial Council were to report that the territorial appellate court had *not* developed such "traditions," Congress would continue federal oversight by extending

the time that the territorial appellate court's decisions were subject to review by the Third Circuit. Both §1613 and §1493 are part of the congressional plan to allow the law of the Territory to develop, subject to the oversight of the Third Circuit.

Congress has followed a careful plan to foster legal development in the Virgin Islands for the past 86 years. The Third Circuit's decision has thwarted at least part of this plan by depriving the Government of Third Circuit review in an important category of criminal cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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App. 1

PRECEDENTIAL

Filed June 18, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1457

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellant,

v.

JAMEL RIVERA

On Appeal from the Appellate Division of the
District Court of the Virgin Islands,
Division of St. Thomas and St. John
D.C. Criminal No. 00-cr-00228
[Honorable Raymond L. Finch and Honorable Thomas
K. Moore, United States District Judges,
and Honorable Edgar D. Ross, Territorial Court Judge]

Argued Nov. 8, 2002

Before: SCIRICA, *Chief Judge*,* ALITO and RENDELL,
Circuit Judges

* Judge Scirica began his term as Chief Judge on May 4, 2003.

OPINION OF THE COURT

SCIRICA, Chief Judge.

The Appellate Division of the District Court of the Virgin Islands remanded this criminal case for resentencing to the Territorial Court of the Virgin Islands. The Government of the Virgin Islands has appealed. At issue is whether we have jurisdiction to hear the government's appeal.

I

On May 22, 1997, a jury convicted Jamel R. Rivera of assault in the first degree in violation of 14 V.I.Code Ann. § 295(1). The Territorial Court of the Virgin Islands sentenced Rivera to eight years imprisonment with credit for time served, followed by two years supervised probation. Rivera appealed both his conviction and sentence to the Appellate Division of the District Court of the Virgin Islands. The Appellate Division affirmed the conviction, but held the sentence was illegal because "the trial court could not impose probation on [Rivera] without suspending all but six months of his prison term or staying the execution of his sentence." *Rivera v. Gov't of the V.I.*, 42 V.I. 203, 211, 2000 WL 151919 (D.V.I.App.Div.2000).[1] The

[1] The Appellate Division relied on 5 V.I.Code Ann. § 3711(a) in holding the "sentence [was] not legal, and cannot stand." *Rivera*, 42 V.I. at 211. Section 3711(a) provides, in part, "[u]pon entering a judgment of conviction . . . not punishable by life imprisonment, . . . a territorial court . . . may suspend the imposition or execution of sentence and place the defendant on probation." 5 V.I.Code Ann. § 3711(a). The statute

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Appellate Division vacated Rivera's sentence and remanded to the Territorial Court for resentencing.

On remand, the Territorial Court resentenced Rivera to "a term of incarceration for a period of ten years, with credit for time served prior to June 19, 1997, from May 22, 1997 to June 19, 1997." *Gov't of the V.I. v. Rivera,* No. F416/1996, at 2 (Terr.Ct. Apr. 12, 2000) (amended judgment and commitment order). The Territorial Court also assessed seventy-five dollars in court costs, an amount higher than that imposed by the original sentence.

Rivera again appealed. The Appellate Division held the resentencing was barred by the Double Jeopardy Clause. *See North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The Appellate Division vacated the amended judgment and commitment order and remanded to the Territorial Court for resentencing. *Rivera v. Gov't of the V.I.,* 183 F.Supp.2d 770, 773 (D.V.I.2002).[2]

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further provides "if the maximum punishment provided for such offense is more than six months, ... a territorial court ... may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation." *Id.*

[2] The Appellate Division held the Territorial Court order "seemingly" did not "give Rivera [proper] credit for the time he has spent in prison pending appeal and resentencing." *Rivera,* 183 F.Supp.2d at 772. The Appellate Division also held "the Territorial Court cannot impose costs" – the seventy-five dollars – "higher than those required at the time of Rivera's original sentencing" – twenty-five dollars. *Id.* at 773. The Appellate Division directed these matters also should be corrected by the Territorial Court.

The Government of the Virgin Islands now seeks review of the Appellate Division's judgment remanding for resentencing.

II

Before we review the merits of an appeal, we must determine whether we have jurisdiction. To do so here, we must focus on the Virgin Islands court structure and the territorial prosecutor's authority.

A. The Virgin Islands Court Structure

The United States Constitution grants Congress the authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under this constitutional authority, Congress enacted the Revised Organic Act of the Virgin Islands. 48 U.S.C. §§ 1541 *et seq.*[3] The Revised Organic Act is "the Virgin Islands' equivalent of a constitution," *Brow,* 994 F.2d at 1032, and vests the judicial power of the Virgin Islands in local courts established by local law and in the District Court of the Virgin Islands, 48 U.S.C. § 1611. In 1984, Congress made significant amendments to the Revised Organic Act. *See* Act of Oct. 5, 1984, Pub.L. No. 98-454, 98 Stat. 1732.

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[3] "Congress enacted the first . . . Organic Act of the Virgin Islands in 1936. Because this Act was not comprehensive, Congress enacted the Revised Organic Act of 1954 . . . ,which operated to repeal the 1936 Act." *Brow v. Farrelly,* 994 F.2d 1027, 1032 (3d Cir.1993) (citations omitted). Since 1954, the Revised Organic Act has been amended on various occasions.

These amendments, along with certain more recent changes in Virgin Islands law, have shaped the current court structure in the Virgin Islands.

The Virgin Islands court structure consists of the Territorial Court of the Virgin Islands, which has original jurisdiction over local civil actions, local criminal actions, and certain other matters, 4 V.I.Code Ann. § 76; 1993 V.I. Sess. Laws 5890,[4] and the District Court of the Virgin Islands, which has "the jurisdiction of a District Court of the United States," as well as jurisdiction over certain other matters, 48 U.S.C. § 1612.[5] Appeals from the Territorial Court are heard by the Appellate Division of the District Court of the Virgin Islands. The Appellate Division functions as an appellate tribunal for local matters until such time as the Virgin Islands legislature creates a local appellate court. *See* 48 U.S.C. § 1613a; 4 V.I.Code Ann. § 33.[6] The United States Court of Appeals

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[4] "The District Court of the Virgin Islands has . . . original federal question and diversity jurisdiction . . . , and shares this jurisdiction concurrently with the Territorial Court of the Virgin Islands." *Brow*, 994 F.2d at 1034 (citations omitted).

[5] The District Court "retains concurrent jurisdiction with the Territorial Court over criminal actions in which the local crimes charged are related to federal crimes." *Callwood v. Enos*, 230 F.3d 627, 631 (3d Cir.2000) (explaining 48 U.S.C. § 1612(c)).

[6] Appeals to the Appellate Division are heard and determined by a panel "consisting of three judges, of whom two shall constitute a quorum." 48 U.S.C. § 1613a(b). The Chief Judge of the District Court is the presiding judge of the Appellate Division and the other judges on a panel are selected "from among the judges who are serving on, or are assigned to, the District Court." *Id.* One judge on the panel "may be a judge of a court established by local law." *Id.* Subject to certain restrictions, local law prescribes the appellate jurisdiction of the Appellate Division. 48 U.S.C. § 1613a(a).

for the Third Circuit has "jurisdiction of appeals from all final decisions" of the District Court when the District Court acts as a trial court and also in its capacity as the Appellate Division. 28 U.S.C. § 1291 ("The court[ ] of appeals . . . shall have jurisdiction of appeals from all final decisions of . . . the District Court of the Virgin Islands. . . . "); 48 U.S.C. § 1613a(c) ("The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law.").

The Virgin Islands court structure, incorporating the Appellate Division of the District Court as an appellate tribunal for local law, reflects Congress's intent to encourage "the development of a local Virgin Islands appellate structure with greater autonomy with respect to issues of Virgin Islands law." *In re Alison,* 837 F.2d 619, 622 (3d Cir.1988). The Appellate Division "represents a step" toward such an autonomous appellate structure. *Id.* At the same time, the Appellate Division is "not an insular [local] appellate court," but is "essentially a federal creature." *BA Props. Inc. v. Gov't of the V.I.,* 299 F.3d 207, 212 (3d Cir.2002). Thus, in many contexts, we "treat[ ] appeals from the Appellate Division of the District Court of the Virgin Islands no differently than appeals taken from any other federal district court." *Ortiz v. Dodge,* 126 F.3d 545, 548 (3d Cir.1997); *see also BA Props.,* 299 F.3d at 212 ("We will . . . exercise plenary review over the Appellate Division's order, much as we would when reviewing a district court. . . . "). It is within this context, where the Government of the Virgin Islands appeals a judgment of the Appellate Division of the District Court in a local criminal action, that we consider our jurisdiction.

B. Prosecutorial Authority To Appeal

It is axiomatic that a prosecutor has "no right to appeal an adverse criminal judgment unless expressly authorized by statute to do so." *Arizona v. Manypenny,* 451 U.S. 232, 245, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981); *see also United States v. Wilson,* 420 U.S. 332, 336, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) ("This Court early held that the Government could not take an appeal in a criminal case without express statutory authority."); *Gov't of the V.I. v. Christensen,* 673 F.2d 713, 715 (3d Cir.1982). Thus, a legislature must "speak with a clear voice" in order to authorize a prosecutorial appeal in a criminal action. *Manypenny,* 451 U.S. at 247, 101 S.Ct. 1657; *see also id.* at 246, 101 S.Ct. 1657 ("[T]he presumption [is] that the prosecution lacks appellate authority absent express legislative authorization to the contrary."). Here, the Government of the Virgin Islands asserts that its authority to appeal is supplied by 48 U.S.C. § 1493(c). The statute provides, "The prosecution in a territory . . . is authorized-unless precluded by local law-to seek review or other suitable relief in the appropriate . . . federal appellate court . . . from . . . an adverse decision, judgment, or order of an appellate court." 48 U.S.C. § 1493(c). While 48 U.S.C. § 1493(c) appears to grant broad authority to the Government of the Virgin Islands to pursue an appeal, it is silent on whether an adverse decision, judgment, or order of the Appellate Division must be final in order for the government to perfect an appeal to this court.[7] At issue is

[7] The legislative history reflects that 48 U.S.C. § 1493(c) was enacted in response to *Territory of Guam v. Okada,* 694 F.2d 565 (9th Cir.1982), *amended by* 715 F.2d 1347 (9th Cir.1983). 130 Cong. Rec. 23,792 (1984). *Okada* "held that the government of a territory[, namely

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whether finality is required for appeals under 48 U.S.C. § 1493(c).

1. The Finality Requirement

Generally, federal courts of appeals are limited to reviewing final decisions, judgments, and orders. Under 28 U.S.C. § 1291, courts of appeals "have jurisdiction of appeals from all final decisions of the district courts." More specifically, finality is required by 48 U.S.C. § 1613a(c), which provides jurisdiction for this court over appeals from the Appellate Division. 48 U.S.C. § 1613a(c) ("The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law."); *see also Ortiz,* 126 F.3d at 547 ("Under 28 U.S.C. § 1291 and 48 U.S.C. § 1613a(c), our jurisdiction is limited to 'final decisions' from the District Court of the Virgin Islands."). Under this finality requirement, "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511

Guam,] may not appeal to a federal court in a criminal case from a ruling – even that of [a district court sitting as] an appellate court-in the favor of the defendant, in the absence of a federal statutory authorization." *Id.* Because there was no federal statutory authorization at the time of the decision, the Guam prosecutor could not appeal an adverse decision of the Appellate Division of the District Court of Guam to the United States Court of Appeals for the Ninth Circuit.

The legislative history of 48 U.S.C. § 1493(c) is silent on whether an Appellate Division's adverse decision must be final in order to be appealable.

U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). The requirement "descends from the Judiciary Act of 1789 where the First Congress established the principle that only final judgments and decrees of the federal district courts may be reviewed on appeal." *Cunningham v. Hamilton County,* 527 U.S. 198, 203, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (quotations omitted). It serves "several salutary purposes," including "promoting efficient judicial administration" and avoiding "the harassment and cost of a succession of separate appeals." *Id.* at 203-04, 119 S.Ct. 1915 (quotations omitted). We recognize that there are limited departures from the finality requirement. For example, Congress may "authorize[ ], through . . . statutory provisions, immediate appeals . . . in certain classes of cases." *Johnson v. Jones,* 515 U.S. 304, 310, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).[8] But, "interlocutory appeals . . . are the exception, not the rule." *Id.* at 309, 115 S.Ct. 2151.

One exception to the finality requirement is found in 18 U.S.C. § 3731. The statute authorizes prosecutorial appeals in criminal actions.[9] Parts of 18 U.S.C. § 3731

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[8] In addition to statutory departures from the finality requirement, the collateral order doctrine is "a narrow exception to the normal application of the final judgment rule." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989).

[9] 18 U.S.C. § 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal

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specifically provide for appeals of certain non- final orders, including orders granting new trials and suppressing or excluding evidence. Thus, courts have heard appeals of certain interlocutory orders under this statute. *See, e.g., Charleswell,* 24 F.3d at 574 ("[O]ur jurisdiction over the [prosecutor's] appeal is not dependent on 28 U.S.C. § 1291. Instead, we have jurisdiction ... under 18 U.S.C. § 3731.... "). But, we have held that "18 U.S.C. § 3731 does not authorize an appeal of a sentencing order." *Gov't of the V.I. v. Douglas,* 812 F.2d 822, 829 (3d Cir.1987).

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shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

....

The provisions of this section shall be liberally construed to effectuate its purposes.

While the statute specifically refers to prosecutorial appeals "by the United States," we have held that it also "applies to appeals taken by the Government of the Virgin Islands." *Gov't of the V.I. v. Charleswell,* 24 F.3d 571, 574 (3d Cir.1994). Moreover, 18 U.S.C. § 3731 applies to appeals from the District Court of the Virgin Islands sitting both as a trial court and as an appellate court. *Id.* at 574-75.

Thus, the Government of the Virgin Islands concedes 18 U.S.C. § 3731 is not applicable here.[10] Instead, the government contends 48 U.S.C. § 1493(c) authorizes its appeal.

But unlike 18 U.S.C. § 3731, the text of 48 U.S.C. § 1493(c) does not expressly provide for appeals of non-final orders.[11] As noted, 48 U.S.C. § 1493(c) is silent on finality. With no contrary authorization, we apply the general finality rule. Moreover, there is a "presumption that the prosecution lacks appellate authority absent express legislative authorization." *Manypenny,* 451 U.S. at 246, 101 S.Ct. 1657. Thus, absent Congressional authorization permitting the Government of the Virgin Islands to appeal non-final orders to this court, appeals under 48 U.S.C. § 1493(c) are limited to final decisions, judgments, and orders.

2. Accord With Existing Jurisprudence

Requiring finality for appeals under 48 U.S.C. § 1493(c) accords with the role of the Appellate Division within the Virgin Islands court structure. As noted, we generally treat appeals from the Appellate Division of the District Court of the Virgin Islands the same as appeals from any other federal district court. *See Ortiz,* 126 F.3d at 548 ("[W]ith regard to the question of finality, we have

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[10] We note that, aside from reiterating that 18 U.S.C. § 3731 does not authorize appeals of sentencing orders, our discussion of the statute takes no position on what types of non-final orders may be appealed under it.

[11] Nor does the legislative history of 48 U.S.C. § 1493(c) indicate non-final orders may be appealed under the statute.

treated appeals from the Appellate Division of the District Court of the Virgin Islands no differently than appeals taken from any other federal district court."). In order to maintain consistency between appeals from the Appellate Division and other federal district courts, an appeal from the Appellate Division should either meet the finality requirement or satisfy a generally applicable finality exception. Allowing an exception to finality for appeals under 48 U.S.C. § 1493(c) would treat appeals from the Appellate Division differently than appeals from other federal district courts.

Requiring finality also corresponds with another decision of this court. Recently, in *Government of the Virgin Islands v. Marsham,* we addressed a similar situation. 293 F.3d 114 (3d Cir.2002). In *Marsham,* the defendant had appealed to the Appellate Division his sentence and restitution order imposed by the Territorial Court. The Appellate Division affirmed the sentence, but "remanded the case to the Territorial Court, ordering . . . that the restitution order be vacated." *Id.* at 116. The Government of the Virgin Islands then appealed "the Appellate Division's vacatur of the restitution order" to this court. *Id.* In addressing appellate jurisdiction over the government's appeal, we held the Appellate Division's decision must be final in order to be appealable. *Id.* at 117 ("The issue here is whether the Appellate Division's decision is a final order.").[12]

[12] Notably, we did not specifically address 48 U.S.C. § 1493(c) in *Marsham.* Moreover, in *Marsham,* we concluded there was a "final [decision] for purposes of our appellate jurisdiction" because the Appellate Division judgment "conclusively and finally determined the

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Moreover, the United States Court of Appeals for the Ninth Circuit has read 48 U.S.C. § 1493(c) in conjunction with 48 U.S.C. § 1424-3(c), an analog of 48 U.S.C. § 1613a(c) providing "jurisdiction of appeals from all final decisions of the appellate division of the district court" of Guam. 48 U.S.C. § 1424-3(c). Under 48 U.S.C. § 1493(c), the territorial prosecutor in "Guam has the authority to appeal to [the Ninth Circuit] from an adverse final decision or order of the Guam Appellate Division." *Territory of Guam v. Borja,* 983 F.2d 914, 916 (9th Cir.1992); *see also Territory of Guam v. Estrebor,* 848 F.2d 1014, 1015 (9th Cir.1988) ("48 U.S.C. § 1493(c), enacted after *Okada,* authorizes the prosecution in a territory to seek review of an adverse decision of an appellate court, and 48 U.S.C. § 1424-3(c) provides that this court has jurisdiction over appeals from all final decisions of the appellate division of the district court of Guam.").

In sum, there is no statutory authorization that would permit the prosecutor to appeal and to breach the traditional finality requirement. We hold that the Government of the Virgin Islands may only appeal final decisions, judgments, or orders under 48 U.S.C. § 1493(c).[13]

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issue of [the defendant's] sentence and restitution, and sent the matter back simply for a ministerial entry" to vacate the restitution order. 293 F.3d at 117. But as we discuss *infra* Section II.C, there is no final decision here.

[13] As noted, there are limited exceptions to the finality requirement, but none applies here.

C. No Final Decision

Our inquiry shifts to whether there is a final decision. A final decision "ends the litigation on the merits and leaves nothing . . . to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). In a criminal case, the sentence is the final judgment. *Douglas,* 812 F.2d at 831; *see also Berman v. United States,* 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Thus, generally, "[i]n a criminal case . . . appellate review [is prohibited] until conviction and imposition of sentence." *Flanagan v. United States,* 465 U.S. 259, 263, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984).

The Government of the Virgin Islands has not contended the Appellate Division judgment is final.[14] This is understandable. The judgment neither ended the litigation nor left only the execution of judgment. Instead, it vacated the sentence and remanded to the Territorial Court. At this time, Rivera is under no sentence. There is no final judgment to provide us with appellate jurisdiction.

Our caselaw confirms this lack of finality. In *Marsham,* we suggested that generally an order remanding for resentencing is not final. 293 F.3d at 117.[15] But, in *Marsham,*

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[14] Instead, the government has argued that finality should not be required under 48 U.S.C. § 1493(c).

[15] Similarly, we have found a lack of finality in other cases where the Appellate Division remanded for further proceedings in the Territorial Court. In *Ortiz,* the Appellate Division affirmed a Territorial Court decision that a debtor was entitled to a homestead exemption in a creditor's action to collect. 126 F.3d at 545-47. But the Appellate

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we heard the appeal because "the Appellate Division's order conclusively and finally determined the issue of [the defendant's] sentence and restitution, and sent the matter back simply for a ministerial entry" to vacate the restitution order. *Id.* As noted, the Appellate Division here has vacated the Territorial Court order and remanded for resentencing, leaving Rivera's sentence undetermined. Because the remand requires a new sentencing judgment by the Territorial Court, there is no final decision here.[16]

Division remanded for the Territorial Court to determine the exact extent of the exemption, a calculation necessary to decide the remaining issues in the case. We refused to hear the appeal because the Appellate Division decision was not final. *Id.* at 545. In *In re Alison,* we found no finality after the Appellate Division reversed a Territorial Court judgment on standing grounds and remanded for the case to proceed in the Territorial Court. 837 F.2d at 620.

[16] As noted, the Appellate Division judgment could still be appealed to this court if it satisfies an exception to the finality requirement. We do not find any exception applicable here.

The collateral order doctrine is "a narrow exception to the normal application of the final judgment rule." *Midland Asphalt,* 489 U.S. at 798, 109 S.Ct. 1494. Usually, the collateral order doctrine is invoked by the defendant, but also occasionally by the government. *See Carroll v. United States,* 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957) (analyzing whether the government's appeal could be heard by applying the same underlying concepts of finality used to determine if any order is final and examining whether the grant of a suppression motion satisfied the collateral order doctrine). To be appealable under the collateral order doctrine, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). In the context of a criminal case, the collateral order doctrine is used sparingly because of the need to effectively and efficiently conclude criminal proceedings, without piecemeal interruptions. *See, e.g., Flanagan,* 465 U.S. at 264-66, 104 S.Ct. 1051.

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D. Other Considerations

In concluding its supplemental brief, the Government of the Virgin Islands argues that finding no jurisdiction here is problematic because it will never again be able to seek our review of the Appellate Division's ruling. The government contends that, upon resentencing by the Territorial Court, it will not have the authority to appeal the new sentence and challenge alleged defects with the resentencing before this court.[17]

But this is a matter for Congress or the Virgin Islands legislature. That the Government of the Virgin Islands may not be able to appeal from a future judgment in this case is a consequence of a legislative decision restricting government appeals of sentences. *See Gov't of the V.I. v. Hamilton,* 475 F. 2d 529, 531 (3d Cir. 1973) (The conclusion that this court was without jurisdiction to hear the Government of the Virgin Islands's appeal of a criminal matter from the District Court serving as an appellate tribunal was "reinforced by the fact that [at the time] under . . . local law . . . the defendant alone ha[d] the right

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Here, it is clear that, at the very least, the second prong is not satisfied. In vacating Rivera's sentence and remanding for resentencing, the Appellate Division judgment does not "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand,* 437 U.S. at 468, 98 S.Ct. 2454. Because of the fundamental importance of a sentence to a criminal prosecution, the vacatur and remand reopens an issue central to the merits of the action.

[17] In its supplemental brief, the government states "no matter the outcome at the resentencing hearing, the government cannot appeal it. (18 U.S.C. § 3742(b) cannot be stretched to fit this case, and no other statute would allow the government to appeal)."

in a criminal case to appeal to the District Court from a judgment of the [local] court.").

III

For the reasons discussed, we lack appellate jurisdiction and will dismiss this appeal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1457

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellant

v.

JAMEL RIVERA

(D.C. Crim. No. 00-cr-00228)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
SMITH and CHERTOFF, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for

rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ [Illegible]
Chief Judge

Dated: 08/18/03
OMH/cc: JHF, MP, SAB

48 U.S.C. § 1493. Prosecution; authorization to seek review; local or Federal appellate courts; decisions, judgments or orders

The prosecution in a territory or Commonwealth is authorized – unless precluded by local law – to seek review or other suitable relief in the appropriate local or Federal appellate court, or, where applicable, in the Supreme Court of the United States from –

(a) a decision, judgment, or order of a trial court dismissing an indictment or information as to any one or more counts, except that no review shall lie where the constitutional prohibition against double jeopardy would further prosecution;

(b) a decision or order of a trial court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the prosecution certifies to the trial court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding; and

(c) an adverse decision, judgment, or order of an appellate court.

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

48 U.S.C. § 1613a. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Third Circuit; rules; appeals to appellate court

(a) Appellate jurisdiction of District Court

Prior to the establishment of the appellate court authorized by section 1611(a) of this title, the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local

law to the extent now or hereafter prescribed by local law: *Provided,* That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of the Virgin Islands or of any order or regulation issued or action taken by the executive branch of the government of the Virgin Islands with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

(b) Appellate division of District Court; quorum; presiding judge; designation of judges; decisions

Appeals to the District Court of the Virgin Islands shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The chief judge of the district court shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section 1614(a) of this chapter: *Provided,* That no more than one of them may be a judge of a court established by local law. The concurrence of two judges shall be necessary to any decision by the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction

or failure to take or prosecute it in accordance with the applicable law or rules of procedure. Appeals pending in the district court on the effective date of this Act shall be heard and determined by a single judge.

(c) United States Court of Appeals for Third Circuit; jurisdiction; appeals; rules

The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law. The United States Court of Appeals for the Third Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Appeals to appellate court; effect on District Court

Upon the establishment of the appellate court provided for in section 1611(a) of this title all appeals from the decisions of the courts of the Virgin Islands established by local law not previously taken must be taken to that appellate court. The establishment of the appellate court shall not result in the loss of jurisdiction of the district court over any appeal then pending in it. The rulings of the district court on such appeals may be reviewed in the United States Court of Appeals for the Third Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.